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IN THE

SUPREME COURT OF THE UNITED STATES

1980 Term

No. 79-1716

S & E SHIPPING CORP., Petitioner,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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April 30, 1980

INDEX

Page

Opinion below..... 1
Jurisdiction..... 2
Question presented..... 2
Statement of the case..... 2
Statutory provisions involved..... 7
Reasons for granting the writ..... 8
1. The decision below conflicts with decisions of other courts of appeal and the Supreme Court as to the proper interpretation and application of 49 U.S.C. § 3(4) and the National Transportation Policy..... 8
2. Statutory and public interest considerations require the Commission to protect water carriers of exempt bulk commodities, the same as other carriers. The Commission and lower court did not do this..... 21
Conclusion..... 24

CITATIONS

Cases:

American Express Co. v. South Dakota, 244 U.S. 617, 624 (1916)..... 16
District of Columbia v. Grimes, 404 F2d. 1337, 1342-3 (1968)..... 11
Doraiswamy v. Secretary of Labor, 555 F2d. 832, 847 fn. 9 (1978)..... 11
I.C.C. v. B & O Railroad, 145 U.S. 263, 276, 277 (1892)..... 16
I.C.C. v. Mechling, 330 U.S. 567, at 581 (1947)..... 17
Lake Carriers' Association v. U.S., 399 F.Supp. 386 (N.D.Ohio 1975)..... 18
Lenkin, et al v. District of Columbia, 461 F2d. 1215, 1230 fn. 113 (District of Columbia Circuit)..... 11

Page

Polisnik v. U.S.,
259 F2d. 951, 952 fn. 3 (1958)..... 11
Seatrain Lines, Inc. v. U.S.,
233 F.Supp. 199, 209 (D.N.J. 1964)..... 10
Western Pacific Railroad Co. v. U.S.,
382 U.S. 237 (1965) 10,15,17
Western Pacific Railroad Co. v. U.S.,
263 F.Supp. 140, 145 (N.D.Cal. 1966)..... 10,14

Miscellaneous:

I.C.C. Annual Reports
Vol. 69, p. 18..... 21
Vol. 72, p. 142..... 21
Senate Report No. 91-1080,
91st Cong. 2d session, p. 129..... 23

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The petitioner S & E Shipping Corp. respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 7, 1979.

OPINION BELOW

The opinion of the Court of Appeals (600 F2d 349) appears in the Appendix to the petition by the State

of New York for the same writ of certiorari. S & E Shipping Corp. has consulted with the state, and adopts as its own the Appendix filed by the State of New York.

JURISDICTION

The decision and order of the Court of Appeals for the Second Circuit was entered on May 7, 1979. A timely petition for rehearing in banc was denied on January 31, 1980 following an order by the court on October 3, 1979 posing certain questions to all active parties before deciding on a rehearing to clarify the parties interests, financial and otherwise, with respect to the rates in issue. Those questions were answered on October 19, 1979. This petition for certiorari was filed within 90 days of the date that the petition for rehearing in banc was denied. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the railroad unit train rates in issue discriminate unlawfully against Great Lakes water carriers, such as S & E Shipping Corp., as connecting carriers at Buffalo, New York in water/rail competition for carrying wheat from the north central states to a shipper's facility in Pennsylvania in violation of Section 3(4) of the Interstate Commerce Act and the National Transportation Policy.

STATEMENT OF THE CASE

The cargo in dispute is grain (wheat). It originates in the north central states and is delivered in bulk to milling centers in the east to be distributed

and sold as flour to processors and consumers in the north and mid Atlantic states.

The basic issue is the lawfulness of a unit train rate on wheat from Minnesota and Wisconsin origins (Twin Cities and Twin Ports) to Martins Creek, Pennsylvania, which is 327 miles southeast of Buffalo, New York. The tariff at issue is published by the Soo Line Railroad Company (Soo) and Consolidated Rail Corporation (Conrail) to apply during the open navigation season on the Great Lakes. Wheat potentially can move to Martins Creek over an all rail route via Soo to Chicago, thence via Conrail to Martins Creek, or a lake-rail route via water carrier to Buffalo, thence via Conrail to Martins Creek. Soo and Conrail and other railroads also publish a unit train rate from Twin Ports to Buffalo which is designed to provide an alternative to the practice of storing wheat in vessels during the closed navigation season. This rate is not competitive with the lake vessel charges available during the open navigation season and generally does not move traffic during that season.

In either case, the Soo and Conrail control the ultimate delivered price of wheat since both, together, establish the rate on the all rail route. Conrail, alone, establishes the rate for the rail leg of the lake-rail route. There is no dispute but that Conrail has established charges for connecting water carriers at Buffalo which are twice as much, on a ton mile basis, as it charges for its rail connection with the Soo at Chicago. 356 I.C.C. at 92.

Water carriers (which are called "boats" on the Great Lakes, even though, frequently, they are larger than ocean going vessels) are an integral part of the national transportation system, particularly as they carry cargoes in bulk such as iron ore, coal, grain, limestone, sand, cement and petroleum products. They are essential for the commerce and defense of the nation. When they carry such bulk commodities, they are exempt from economic regulation by the Interstate

Commerce Commission (I.C.C. or Commission). 49 U.S.C. 903(b).[1]

Besides the two railroads who are proponents of the disputed rail rates, the other active parties at the court level are a shipper, a lake carrier, a state, a maritime union and the Commission.[2]

ConAgra, Incorporated (ConAgra) is a milling company based in Omaha, Nebraska and is the shipper involved in this dispute. The shipper supports the rail rates.

S & E Shipping Corp., petitioner here, is a shipping company on the Great Lakes. It is the largest carrier of grain by shipping companies operating on the Great Lakes. The basic movement of grain by S & E (and other water carriers) is from Twin Ports to Buffalo. S & E opposes the railroad rates.

New York State represents the interests of Buffalo and surrounding area in opposition to the rail rates.

The Seafarers International Union AFL-CIO (SIU) represents certain maritime interests on the Great Lakes and is opposed to the railroad rates.

1/ Citations to Title 49 of the U. S. Code are presented herein as before the codification required by Public Law 95-473 (Act of October 17, 1978, 92 Stat. 1466) in order to conform to citations in this case by the Commission and Court of Appeals.

2/ A measure of the significance of the case, in the public interest, is the number of other parties who participated actively in the proceedings below. In addition to the parties in the appeal to the courts, one party supported the rates; twenty opposed (including other railroads; millers; Boards of Trade; public interest groups in Twin Ports, Seaway Authority, Niagara Frontier and Erie County, New York; and Great Lakes operators). There were also numerous letters from senators and congressmen opposing the rail rates.

The Interstate Commerce Commission heard the case and decided that the railroad rates were lawful.

About 172 vessels in the Great Lakes fleet move bulk commodities in the domestic commerce. The carriers and shippers negotiate rates and service, based essentially on the law of supply and demand. They have been doing business like this for generations - in the case of S & E Shipping Corp. for almost 150 years. As a result, trading patterns, facilities and people have come to depend on the lake carriers and shippers continuing in such relationship.

One such fixture is Buffalo, New York.

For as long as can be remembered, grain has been carried by boat from the Twin Ports to the Buffalo mills, made into flour and sold largely in the eastern markets. Thus, Buffalo is the milling center of the United States.

There has been no complaint through the years about this arrangement - not from shippers, millers, consumers, port interests on the Great Lakes, unions or the working people - not even the government.

In this setting, ConAgra, out of Omaha, Nebraska, decided to enter the eastern market. It did not join the Buffalo millers. Instead, it set up operations in Martins Creek. The shipper first looked to insure its supply lines. Negotiations with the Soo and Erie Lackawanna Railroad Company (later Conrail), produced a unit train rate from Twin Ports and Twin Cities. These rates became effective on June 1, 1974.

In the navigation season on the Great Lakes (i.e., when the lakes are not ice-bound), grain can be transported by boat to Buffalo and then by Conrail to Martins Creek. The sailing distance between Twin Ports and Buffalo is 992 miles. The rail mileage between Buffalo and Martins Creek is 327 miles. The rail mileage between Twin Ports and Martins Creeks is 1,383 miles.

The through charge to Martins Creek, boat/rail per CWT is about 72 cents.3/ In the off navigation season, grain can be transported through Buffalo (which has a unit-train rate from Twin Ports) and then by Conrail, at 88 cents per CWT.

The unit train rates on wheat direct from Twin Ports and Twin Cities to Martins Creek were set at about 72 cents for the navigation season and 88 cents in the off season. These rates were specifically set by the railroads to match the boat/rail rate. The rail rate by Conrail (which holds monopoly service east of Buffalo) for the 327 mile segment beyond Buffalo is over 80 percent of the all rail rate for 1,383 miles from Twin Ports.

The case dates back to 1972. Although ultimate findings were favorable to the railroads, the Interstate Commerce Commission had also found, en route to its final decision, that a first set of unit train rates was in violation of the Interstate Commerce Act because of an illegal tie-in arrangement between the railroads and the shipper, and, later, that the same set of rates without the tie-in were unlawful from Twin Ports. The Court of Appeals in its first decision found that Great Lakes bulk carriers were entitled to protection under the Interstate Commerce Act, despite contrary findings by the Commission. The court set aside the Commission's order and remanded the case to the Commission to determine whether the protested rail rates violate Section 3(4) of the Interstate Commerce Act by discriminating against lake carriers as connecting lines at Buffalo.

After the remand, the Commission decided there was no such unlawful discrimination against lake carriers as connecting lines. In reaching this judgment, the Commission substituted Chicago for Buffalo as the point of

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3/ All rates in issue have increased, proportionately, since 1972.

connection between lake carrier and rail service. Also, the Commission found that a hypothetical 50 car unit train service from Buffalo to Martins Creek was not practical and therefore could not cure the rate discrimination which it had already found did exist as between the Chicago-Martins Creek and Buffalo-Martins Creek rail segments. The Court of Appeals in its second decision on the merits, by a split vote, sustained the Commission. The dissenting judge (Timbers) on the second panel had written the opinion for a unanimous panel in the court's first consideration of the case. The two judges in the majority (Van Graafeiland and Moore) had not acted on the case before the remand to the Commission.

Upon request by S & E and other parties opposing the disputed rail rates that the court reconsider the decision in banc, the three judges who had decided the case in the second panel requested the parties to answer certain questions. In doing so, the court specifically advised the parties that it would serve no useful purpose to speculate on a Chicago connection between lake and rail service because: "Once loaded at the source, economy would demand a through lake trip to Buffalo". The court also advised the parties not to argue the hypothetical case of bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek. All active parties answered the question. The court, with the same dissent, denied petitions for rehearing.

STATUTORY PROVISIONS INVOLVED

49 U.S.C. §3(4)
- Connecting lines

49 U.S.C. §903(b)
- Bulk exemptions

49 U.S.C. §3(1)
- Interchange of traffic, prejudice

49 U.S.C. 10101
- National Transportation Policy

46 U.S.C. 1101
- National Maritime Policy

46 U.S.C. 1177, P.L. 91-469
- (Rehabilitation Great Lakes Fleet)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals And The Supreme Court As To The Proper Interpretation And Application Of 49 U.S.C. §3(4) and the National Transportation Policy.

Section 3(4) of Title 49 provides with respect to interchange of traffic that carriers shall "afford all reasonable, proper, and equal facilities for the interchange of traffic" between their respective lines "and connecting lines". Further, with respect to such interchange, carriers "shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic....".

Both majority and dissenting judge agree that "S & E Shipping falls within the protective umbrella of Section 3(4)..." 600 F2d at 355, fn. 3.

The protested tariff is unlawful. It violates Section 3(4) of the Act and is contrary to the National Transportation Policy[4/] in that Conrail while serving the port of Buffalo does not afford comparable rate reductions or unit train service on wheat interchange between lake carriers and that railroad, nor does it afford comparable rate reductions or unit train service on flour milled in Buffalo and moving to eastern destinations, such as New York and Philadelphia.

4/ 49 U.S.C. 10101. It is the policy of the United States "to provide for the impartial regulation of the modes of transportation" subject to regulation by the I.C.C. and the Commission, in regulating those modes, among other things, is "to recognize and preserve the inherent advantage of each mode of transportation".

The protested tariff constitutes unfair and destructive competition in violation of National Transportation Policy in that such tariff fails to recognize the inherent advantage of Great Lakes water carriers to provide low cost transportation service and the Commission has no discretionary power to approve any type of rate which reduces the inherent advantage of water transportation in whole or in part.

It is no longer in dispute that a rate differential, unjustified by cost differences, has been shown. The Commission so found. 356 I.C.C. at 92. The resulting question, therefore, (as framed by Judge Timbers in his dissent, at 2526) is whether the railroads can justify charging twice as much to transport wheat over a rail route that connects with a water carrier than over the competing rail route that connects with another railroad, despite the fact that the rail revenue yield on the water-rail route is substantially higher than the yield on the competing rail route.

The unjustified maintenance of a rate disparity between connecting lines is prejudical and discriminatory and is specifically prohibited by 49 U.S.C. Sec. 3(4).

In its first decision reported at 346 I.C.C. 814, the Commission did not reach the question of whether the unit train rate discriminated against the lake carriers because it held the lake carriers were not entitled to the protection of the statute. The Court of Appeals in its first decision held that the Commission erred in so holding and remanded the proceeding to the Commission "for the limited purposes of determining whether proposed rates discriminate against the lake carriers as connecting lines." 568 F2d at 897.

Protestants of the rail rates had previously contended that the rate disparity was not cost justified, i.e., that the cost of performing rail service over the two competing routes did not justify disparate rate treatment. Controlling precedent holds that if a railroad cannot cost justify that disparate rate treatment,

the rates are discriminatory. Western Pacific Railroad Co. v. United States, 382 U.S. 237 (1965); Seatrain Lines Inc. v. United States, 233 F.Supp. 199, 209 (D.N.J. 1964); and Western Pacific Railroad Co. v. United States, 263 F.Supp. 140, 145 (N.D.Cal. 1966).

On remand, the Commission accepted additional evidence showing the changes in the level of rates. The new evidence showed that Conrail still charges twice as much to transport 100 lbs. of wheat one mile when it connects with a water carrier at Buffalo than when it connects with a fellow railroad at Chicago. The Commission found that this disparity in rate treatment could not be justified on the basis of relative costs. 356 I.C.C. at 92. This should have put an end to the matter.

The Commission found, however, that since Conrail could not perform the inter-train service from Buffalo in connection with water carriers, no discrimination existed. The complaint, however, is not that there is no unit train service out of Buffalo but that the water carriers are discriminated against at Buffalo because the railroad rate is twice as much on a per mile basis when the railroad connects with a water carrier than when it connects with a fellow railroad and the railroads have never justified this disparity.

A majority of the Second Panel of the Court of Appeals based its decision on the ground that it would be inefficient and uneconomical for Conrail to institute unit train service from Buffalo to Martins Creek, 600 F.Supp. at 352-353. It is to be emphasized, however, that the fact that a hypothetical unit train service cannot be instituted is wholly irrelevant to the determination of whether the rate in issue is discriminatory. This was the controlling issue under the remand from the Court of Appeals to the Commission. The court remanded for the specific limited purpose of determining whether the rate discriminates against lake carriers, that is, whether the disparate rate treatment was cost justified and not to consider the question of whether the lack of unit train service from Buffalo to Martins Creek dis-

criminates against lake carriers. The latter question is the only question addressed by the Commission on remand and the only question affirmed by the majority opinion. Clearly, therefore, as the dissenting opinion states "The Commission on remand either has misconstrued [the Court's] mandate or has ignored it." The majority decision is thus based on a fundamental misunderstanding of the court's prior opinion and the purpose of the remand.

The two judges (Van Graafeiland and Moore) who were not on the case before effectively told the one judge (Timbers) who was on the case before and who had written the opinion for a unanimous court, what the first panel meant when it sent the case back to the Interstate Commerce Commission.

This was highly unusual.[5]/

5/ Polisnik v. U.S., 259 F.2d 951, 952, fn 3, (1958) (District of Columbia Circuit). Three judge court felt bound to affirm exclusionary rulings by District judge even when they disagreed with his rulings, where the court en banc had reaffirmed the rule that was the basis for the ruling by the District judge. District of Columbia v. Grimes, 404 F.2d 1337, 1342-43 (1968) (District of Columbia Circuit). Court held defendant could not be convicted without colliding head on with established precedents and that it must follow earlier rulings as they can only be overturned by court en banc. Lenkin, et al. v. District of Columbia, 461 F.2d 1215, 1230, fn. 113 (District of Columbia Circuit). Panel said it needed authority to overturn another panel. Tulford v. Klein, 529 F.2d 377, 379 (1976) 5th Cir. LA. "One panel of this court may not overrule another prevous panel, absent controlling Supreme Court authority". Doraiswamy v. Secretary of Labor, 555 F.2d 832, 847 fn 9 (1978) (District of Columbia Circuit). Court, as a panel, does not have authority to overturn holdings of another panel. The proposal should have been addressed to the court, en banc.

S & E had argued after the Commission's decision on remand that the court wanted the Commission to decide if there was discrimination, at Buffalo, not with the Chicago connection, as determined by the Commission. Judge Timbers apparently agreed with that argument. In addition to his statement that the Commission disregarded the order, he emphasized that the majority of the court had supported a "hypothetical" unit-train service, which to him was "totally beyond the scope of our mandate".

The force of the dissent and, perhaps, the argument of protestants in their request for rehearing may have prompted the court to consider the merits further. In any event, the court propounded to the parties a series of questions. There was no opinion from the court after receiving answers to the questions. But the questions reveal fundamental uncertainty about the case suggesting, as petitioner contends, that an important national transportation policy issue is at stake, which warrants review by this Court.

Questions By The Court Of Appeals After Decision On Merits. In the order by the second panel of the Court of Appeals directing the parties to submit briefs in response to questions, certain comments by the court, which were pertinent to the questions asked, show that the dissent is the better opinion.

The Court stated:

> No interest would be served by speculating on a Chicago lake-rail interchange. Once loaded at the source, economy would demand a through lake trip to Buffalo. Nor should there be argument based on bringing 50-car unit trains into Buffalo and shipping from that point to Martins Creek.

By this comment the court effectively disposed of matters featured at earlier stages of this proceeding. This is especially significant with respect to the matter of the 50-car unit train service between Buffalo and Martins Creek (the so-called hypothetical new unit-train service). This was the sole basis for the Commission's decision to permit "the railroads to maintain a rail rate structure which discriminates against water carriers at Buffalo", Majority Opinion at page 2527. S & E submits that this effectively disposes of the dispute, in accordance with Judge Timbers' dissent wherein he stated at page 2527:

> The railroads, in my view, have totally failed to justify the undisputed rate discrimination which has been found, permitting ConRail to earn roughly twice as much, after expenses, from its Buffalo-Martins Creek route as from its Chicago-Martins Creek route.

The Court also stated:

> However, the Buffalo-Martins Creek rate is not per se determinative of discrimination but only as related to the total rates from grain source to Martins Creek via lake-rail or all-rail methods of transportation. We had assumed that this Court was being asked 'to order the cancellation of the unit-train rates from Twin Ports and Twin Cities to Martins Creek because the Buffalo to Martins Creek rates are proportionately higher and more profitable'.

The proper comparison of rates is not all inclusive,

as stated, by determining the discriminatory nature of the all-rail rates by comparing them with the rates from grain sources to the ultimate destination on the lake-rail route. The comparison made by the lower court and the Commission is that described by Judge Timbers.

The facts are undisputable that a prima facie case of discrimination, prohibited by Section 3(4), has been presented in that there exists a disparity between the rail portion of the ex-lake traffic and the proposed all-rail rate.6/ The railroad cannot justify the undisputed rate discrimination found which permits Conrail to earn twice as much after expenses from its Buffalo-Martins Creek route as from its Chicago-Martins Creek route.

The existence of discriminatory rates against lake carriers in violation of Section 3(4) is determinative of this proceeding in that the rail carriers failed to justify these rate disparities, under the rule of Western

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6/ Stated in somewhat different terms the district court in Western Pacific Railroad Company v. United States, 263 F.Supp. 140, 145 (N.D.Cal. 1966) described the discrimination as follows:

> "Such discrimination exists when a carrier (in this case Northern Pacific or Union Pacific) enters into a joint through rate arrangement with another connecting line carrier (in this case Southern Pacific), but refuses to enter into the same rate arrangement with another connecting line (in this case Western Pacific)."

Pacific Railroad Co. v. United States, 382 U.S. 237 (1965).7/

Actual Questions. The court inquired whether the 40-cent rate from Buffalo to Martins Creek was discriminatory and if so, how?

The question indicates fundamental uncertainty what the court was deciding. In the opinion of the second panel in discussing the 40-cent rate, the majority stated:

> The rate eastward from Buffalo was the same, however, regardless of whether grain movement into Buffalo from the west was by ship, rail, or truck. Clearly, no carrier from the west could claim that it was being discriminated against because of the higher Buffalo to Martins Creek rate.

This statement must be read in conjunction with the court's more recent comment introducing the questions wherein it was stated:

> "...the Buffalo-Martins Creek rate is not per se determinative of discrimination - but only as it is related to...[other rates]."

7/ The nature of this burden was described in a subsequent decision following the Supreme Court's mandate in 263 F.Supp. 140 at 146 (N.D.Cal. 1966):

> "The burden of proceeding would then shift to defendants to prove some dissimilarity of operating conditions that would substantially affect them in the event they were required to grant equality of treatment."

This more recent statement of the court is consistent with the lake carriers' position and, more importantly, with the distinctions drawn by the United States Supreme Court dating back to the earliest decisions following enactment of the Interstate Commerce Act. See I.C.C. v. B & O Railroad, 145 U.S. 263, 276, 277 (1892). Again in American Express Co. v. South Dakota, 244 U.S. 617, 624 (1916) Mr. Justice Brandeis said:

> "...rates may be within the zone of reasonableness and yet involve unjust discrimination (citing B & O Railroad). Proceedings to remove unjust discrimination are aimed directly at the relation of rates." (emphasis the court's).

The lake carriers have never contended the 40-cent rate from Buffalo to Martins Creek was discriminatory in itself. This is so because the question of rate discrimination concerns a relationship of rates and no purpose can be served to attempt to evaluate a rate in a vacuum unrelated to other rates or charges.

When the Buffalo-Martins Creek rate is related to the all rail rate from Chicago to Martins Creek, the discrimination against S & E as a connecting carrier at Buffalo is that the high rail rate out of Buffalo supports - subsidizes it may be said - the very low rail rate out of Chicago for Martins Creek. Since the basis for the railroads charging high rates out of Buffalo is the low water rate into Buffalo (thereby giving the railroads several strings to pull in fashioning a rail rate into Martins Creek from Chicago or Buffalo), the railroads are discriminating against the low cost water carrier which the National Transportation Policy, Section 3(4) and common sense say should be preserved.

It follows that the high rail rate out of Buffalo is discriminatory against lake carriers connecting at Buffalo in violation of Section 3(4).

Question About Trans-Shipment At Buffalo. The court also asked about the effect, if any, of a trans-shipment of grain at Buffalo from lake to rail on the overall rates from source to Martins Creek.

This question raises the rule of Western Pacific Railroad Co. v. United States, 382 U.S. 237 (1965), which the court did not properly apply. Judge Timbers pointed out it is undisputed on the record that a rate differential exists, unjustified by cost differences, and that the rule in Western Pacific places the burden on the railroads to justify the differential on the basis of different operating conditions - which they did not do.

The premise for any such justification was eliminated by the court deciding not to consider the Commission's invention of a Chicago connection. That is, the Commission substituted Chicago for Buffalo to satisfy Section 3(4) requirements after finding operational difficulties on a service not in issue.

The difficulty with that finding, as Judge Timbers pointed out in his dissent, is that it is not based on "existing actual conditions but on a hypothetical new unit-train service." Railroads are entitled to take into account their different operating costs in establishing rates over two routes and charge different rates accordingly. But that does not mean they can allege inefficiencies, difficulties or mythical problems unrelated to costs as a justification. The Supreme Court in I.C.C. v. Mechling, 330 U.S. 567 (1947) at 581, made this clear:

> "But the extra service must fit the extra charge and cannot justify lump sum rate increases which cut into the inherent advantage of cheaper barge transportation which Congress intended to guaranty to shippers."

On this basis, the trans-shipment of grain at Buffalo from lake to rail has no relationship to the over-all rates from source to Martins Creek other than the cost/

revenue comparisons established in this record, namely, that Conrail earns about "twice as much, after expenses" in the rail segment of the water-rail route and this reflects disparity of treatment amounting to discrimination under Section 3(4).

Question About All Rail Rates. Another question by the court warrants special comment.

The court asked about the propriety of the all-rail rates from the grain sources to Martins Creek.

As the court was still asking basic questions about the dispute, even though this was the third time it was considering the case on the merits, it was not thought to be ungraceful to say that the court missed the good opportunity it had the first time it considered the case to decide it on grounds on which the dispute is actually based, i.e., prejudice to water carriers in violation of the National Transportation Policy, supra.

The court had declined to rule upon the lake carriers' argument that the Commission erred in failing to protect the lake carriers, the Port of Buffalo and other Buffalo interests from prejudicial and discriminatory rail rates and practices which were designed to divert wheat traffic away from Buffalo because this claim, based on Section 3(1) of the Act (49 U.S.C. §3(1)), had not been presented to the Commission. The argument, however, had been based on the National Transportation Policy.

The court did note that the argument was based primarily on Lake Carriers' Association v. United States, 399 F.Supp. 386 (N.D.Ohio 1975)(three-judge court). The decision in that case, under similar competitive conditions, was for the lake carriers based on considerations of the National Transportation Policy.

In deciding not to rule on this argument by the lake carriers, the court could not find "exceptional circum-

stances which would impel us to consider the issue here despite the failure to present it to the Commission."

This Court might conclude there were exceptional circumstances.

Like the ship with a thousand leaks, lake carriers were busy responding to every salvo by the Interstate Commerce Commission. The Commission said, for instance, lake carriers were not entitled to protection under the Interstate Commerce Act because they were exempt bulk carriers (for which the Commission had no taste, as evidenced by almost yearly recommendations to Congress since 1940, to eliminate the bulk cargo exemption - but where the Congress went the other way and increased the exemption); that lake carriers were not connecting carriers deserving of protection, even under Section 3(4); that lake carriers were not deserving of consideration on economic competition with railroads because they did not provide the precise cost data which I.C.C. regulated railroads were in a position to provide, etc.

Lake carriers had their hands full.

The Commission did not relent in its efforts to sink the lake carriers even after the unanimous decision of the first panel of the Court of Appeals in its first decision that lake carriers were entitled to protection and that S & E was a connecting carrier at Buffalo. Witness: the Chicago connection. While that court advised lake carriers to disregard that issue, it cannot be dismissed from the water carriers' consideration of the case that the Interstate Commerce Commission has gone to extreme limits to see that water carriers, which are mandated by Congress to be protected by the Commission the same as any other mode of carrier, did not get required protection from undue prejudice and disadvantage by the railroads.

As indicated, water carriers on the Great Lakes have carried grain, satisfactorily, from the upper lakes to Buffalo for a very long time. The railroads knowing of

the restrictions in the Interstate Commerce Act against driving out service by a competing mode set rates specifically to match the water rail rate from Twin Ports to Martins Creek. Those rail rates will go up surely once water competition is eliminated.

The National Transportation Policy forbids this result.

This Court should not, without review of lower court and Commission proceedings, permit a new service which is consciously and deliberately set up to eliminate the established service, particularly as the Congress has insisted that a carrier which has the inherent advantage in cost or service should be preserved, in the public interest.

2. Statutory And Public Interest Considerations Require The Commission To Protect Water Carriers Of Exempt Bulk Commodities The Same As Other Carriers - The Commission And Lower Court Did Not Do This.

At the time the Commission authorized the protested rail rates in 1976, it noted the prospects for the imminent financial failure of the Erie Railroad and the hope for its survival under the Rail Reorganization Act. Indeed, the Commission gave the appearance of being a cheerleader for the Erie. Although the Commission found that the rail rates were not cost justified, it approved them.

In its public interest deliberations, the Commission should also have considered the positive action taken by the Congress to upgrade the Great Lakes fleet.

The Merchant Marine Act, 1970, (46 U.S.C. 1101, P.L. 91-469 (1970)) was passed almost unanimously. For the first time, Congress extended very substantial tax and other financial aid to rehabilitate the domestic Great Lakes fleet. Also, the Congress officially designated

the Great Lakes as the fourth seacoast of the United States. Since that time, additional legislation has been passed to enable the Corps of Engineers to extend the navigation season on the lakes and to earmark specific percentages of government aid to upgrade Great Lakes shipping.

As a result, more new boats were built for the domestic Great Lakes service immediately after the 1970 Act than in the previous 45 years combined.

Since 1954, the Interstate Commerce Commission has repeatedly recommended to the Congress that it repeal the exemption for bulk cargo water carriers under Section 303(b) of the Act. (49 U.S.C. §903(b)).

In its 68th annual report to the Congress in 1954, the I.C.C. stated:

> "...the exemption adversely affects the public interest in stable, reasonable and properly related rates and makes effective regulation of water transportation impossible..." (p. 20).

In its 69th annual report in 1955, the I.C.C. repeated the statement and added that it favored bills which would remove the bulk exemption for water carriers (p. 18).

In 1958, in its 72nd annual report, the I.C.C. expressly recommended the repeal of Section 303(b), giving the following reasons for its recommendation:

> "Because of the various exemptions in part III of the act, the greater percentage of all domestic for-hire water transportation is free from economic regulation by the Commission. The most significant of these is the so-called bulk commodity exemption.

> This exemption puts the regulated carriers to a distinct competitive disadvantage and results in discrimination between shippers and localities. The public interest in stable, reasonable, and properly regulated rates cannot find expression in the complete absence of control of such a large segment of the bulk-carrying trade.
>
> Enactment of this recommended amendment would go a long way toward correcting this undesirable situation and would also constitute an important step toward equality of treatment of carriers of the various modes." (p. 142).

The Commission again made this recommendation in 1961. It held to the same position in later years.

The Commission's fundamental opposition to exempt dry bulk water carriers may be explained by its long held economic philosophy that, in order to exercise its responsibilities under the Act, it had to have equal economic control of all carriers subject to its jurisdiction.

The Transportation Act of 1940 made water carriers in the domestic commerce subject to the jurisdiction of the I.C.C. From that time, the Commission has opposed exemptions for bulk water carriers in order not to impinge upon the effectiveness of the Act as a whole - as it viewed its responsibilities. But, most significantly, Congress has gone the other way. Over the opposition of the Interstate Commerce Commission, bulk commodity exemptions for water carriers under Part III of the Act have been extended - not restricted. Whereas, previously, there had been some statutory restrictions on the number and kind of commodity exemptions, at present, the exemption in Section 303(b) applies "to the transportation by water carrier of commodities in bulk".

The Commission's reactionary policy towards water carriers has been emphasized not simply to dramatize that the Commission erred in this case in its findings that Great Lakes bulk carriers were not entitled to protection as connecting lines under Section 3(4) of the Act. The Court of Appeals in its first decision corrected that error. But, the point of Commission opposition to exempt water carriers warrants consideration because, after the remand, the Commission had a special dilemma how to respond to the court.

The Commission had found in its first decision that the rail rates between Buffalo and Martins Creek were not cost justified and, accordingly, that there was - or would have been - discrimination against a carrier entitled to protection as a connecting line. The Commission, however, did not treat this question because it had found that the lake carriers were not entitled to Section 3(4) protection. When the first court panel sent the case back and asked for a finding about rate discrimination against water carriers as connecting lines at Buffalo, the Commission was without a basis to justify its earlier decision supporting the protested rail rates. Since there was already a presumptive finding of such discrimination, the Commission had to find other justification. It came up with "the Chicago connection". Setting up its own straw man, it then knocked it down. Even the majority of the court in the second panel saw through this and specifically advised the parties not to brief the point.

The Commission's attempted circumvention of the court's question, upon remand, is evidence of the Commission's fundamental opposition to protection for bulk water carriers. The lower court should have found this to be error.

The Commission should not be permitted to disregard legislation such as the Merchant Marine Act, 1970 or the legislative history supporting that Act, which authorized research projects to determine the adverse effect on Great Lakes shipping by railroad rate structures. (Senate Report No. 91-1080, 91st Cong. 2d Session., p. 129.)

Surely, the agency which has statutory responsibility to maintain a balanced transportation system, including water carriers of exempt bulk commodities, should not be permitted to disregard the steady, deliberate enactment of law which is specifically intended to sustain domestic water transportation as a key segment of our national transportation system. The statutory injunction to maintain this segment of the system is particularly significant, currently, because of legislation in the transportation industries emphasing de-regulation. The Great Lakes carriers operate on competitive principles of the law of supply and demand, satisfying shipper, industry and consumer needs without the need for economic regulation by federal agencies.

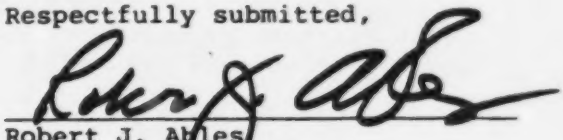
No sensible judgment can be made that legislation to help railroads was intended at the same time to undermine the positive program by Congress to build up and rely on the nation's unregulated water carriers "to carry its domestic water-borne commerce." 46 U.S.C. 1101.

A vital part of our national transportation system is threatened by the railroad actions in this case. Many jobs and people will be affected by the outcome. There is concern for national commerce and defense. The majority of the lower court did not seem sure of its opinion. The dissenting member did. Decisions by other Courts of Appeal and the Supreme Court are at odds with the majority opinion. A writ of certiorari should be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision and order of the Second Circuit.

Respectfully submitted,

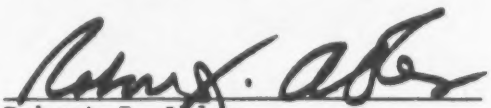


Robert J. Ables
Counsel for Petitioner

April 30, 1980

CERTIFICATE OF SERVICE

This is to certify that on April 30, 1980, I mailed to the following persons, postage prepaid, three copies of the foregoing petition, in accordance with paragraph 3 of Rule 33, Rules of the Supreme Court.



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